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April 29. 1880

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 287.

THE WESTERN UNION RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES OF AMERICA.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WISCONSIN.

FILED OCTOBER 13, 1877.

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1 Circuit court of the United States for the eastern district of Wisconsin.

UNITED STATES OF AMERICA,
Eastern District of Wisconsin, ss:

At a stated term of the circuit court of the United States of America for the eastern district of Wisconsin, begun and held according to lawf at the city of Milwaukee, on the first Monday (being the first day) o- January, A. D. 1877—present, the honorable Thomas Drummond, cir, cuit judge, presiding; Charles S. Hamilton, marshal; Edward Kurtz, clerk—among other the following proceedings were had, to wit:

THE UNITED STATES OF AMERICA
vs.
THE WESTERN UNION RAILROAD COMPANY. } At law.

Be it remembered that heretofore, to wit, on the 6th day of November, A. D. 1875, came the U. S. district attorney, Mr. G. W. Hazelton, and filed his præcipe for a summons in an action on money demand for the amount therein stated, as follows:

Præcipe for summons.

United States circuit court, eastern district Wisconsin.

THE UNITED STATES OF AMERICA
vs.
2 THE WESTERN UNION RAILROAD COMpany.

Please issue summons in this cause, to be served with complaint, for $54,238.12 with interest at six per cent. from the 31st day of December, 1869.

G. W. HAZELTON,
U. S. Att'y, &c., E. Dist. Wisc.

To E. KURTZ, Esq.,
Clerk, &c.

And also filed his complaint, as follows:

Complaint.

United States circuit court, eastern district of Wisconsin.

THE UNITED STATES OF AMERICA
vs.
THE WESTERN UNION RAILROAD COMPANY.

The complaint of the plaintiff respectfully shows to the court and alleges:

That the defendant is and was at the dates hereinafter set forth a corporation, organized and doing business under and in pursuance of the laws of the State of Wisconsin as a railroad company, having its place of business and a portion of its road within the district above named.

That for a portion of the period hereinafter mentioned, the defendant

was known as the Racine and Mississippi Railroad Company, and
3 for the balance of said period as the Western Union Railroad Company, by which latter name it is now known, but that the franchise, property, rights of property, duties, liabilities, and powers of the said defendant have been and continued the same throughout said period, & have been and are unaffected by said change of titles in regard of the claim of the plaintiffs herein set forth.

That by the terms of the act of Congress, approved July the 1st, 1862, entitled "An act to provide internal revenue to support the government & to pay interest on the public debt," it became & was made the duty of any company or corporation owning or possessing or having the care or management of any railroad or railroads upon which steam is used as a propelling power, to pay to the plaintiff a duty of three per centum on the gross amount of all the receipts of such railroad or railroads for the transportation of passengers over and upon the same, and such company or corporation was made subject to the said duty.

That the said act went into effect as to the claim herein made on the first day of August, 1862, and continued in force until July the 1st, 1864.

That during said period the gross receipts of the defendant for fares of passengers was one hundred and ninety thousand eight hun-
4 dred and sixty-three dollars and sixty-eight cents ($190,863.68), and that the defendant became liable and subject to pay the plaintiff thereupon the sum of five thousand seven hundred & twenty-five dollars ($5,725.00), that being three per centum on such gross receipts.

That subsequently and on the 30th day of June, 1864, the said act of Congress was modified by another act which took effect on the 1st day of July, 1864, so that from that date to and until the first day of August, A. D. 1866, it was made and became the duty of the defendant to pay to the plaintiff instead of the said sum of three per centum on the gross receipts for passenger fares as aforesaid, the sum of two and one-half per centum on its entire gross receipts.

That during said period such gross receipts of the defendant were one million four hundred and fifty seven thousand six hundred ninety-nine dollars and thirty-nine cents ($1,457,699.39), and that the defendant became subject to pay to the plaintiff therefor the sum of thirty six thousand four hundred forty-two dollars & forty-eight cents ($36,442.48), that being two and one-half per cent. on such gross receipts of the defendant for said period, to wit, from July 1st, 1864, until August 1st, 1866.

That by another act of Congress, which went into effect on said first day of August, 1866, the law was again changed so that instead
5 of paying a tax or duty of 2½ per cent. on gross receipts as aforesaid, it became the duty of the defendant from said first day of August, 1866, until January 1st, 1870, when the said law was repealed, to pay to the plaintiff a tax or duty of 2½ per cent. on the gross receipts for carrying passengers and mails.

That during said last-named period the gross receipts of the defendant for fares of passengers and for carrying the mails was six hundred and five thousand seven hundred and seventy dollars & nine cents ($605,770.09), and that the defendant became subject to pay the plaintiff thereon the sum of fifteen thousand one hundred forty-four dollars & twenty cents ($15,144 20), that being 2½ per cent. on said gross receipts of said defendant for said period, to wit, from the 1st day of July, 1866, to and until the 1st day of January, 1870.

And this complaint further shows that by an act of Congress approved June 30th, 1864, a tax of five per centum was imposed on all coupons

and on all profits of railroads carried to the account of any fund. That said act remained in force from the 1st day of July, 1864, until the 1st day of January, 1870, when it was repealed.

That during said period the profits of the defendant, that is to say, the amount of its gross receipts in excess of its operating expenses was seven hundred ninety-three thousand seven hundred and eleven
6 dollars and fourteen cents ($793,711.14), and that the defendant became subject and in duty bound to pay the plaintiff by reason of the last above-named act of Congress the sum of thirty-nine thousand six hundred eighty-five dollars fifty-five cents ($39,685.55), that being five per centum upon the said profits of the defendant for the said period, to wit, from the first day of July, 1864, to and until the first day of January, 1870.

That the sum of the taxes which by reason of the premises the defendant became liable to pay to the plaintiff is ninety six thousand nine hundred ninety-seven dollars & twenty-three cents (96,997.23), of which amount the defendant has paid the sum of forty-two thousand seven hundred fifty-nine dollars & eleven cents (42,759.11), leaving due & owing from the defendant to the plaintiff fifty-four thousand two hundred thirty-eight dollars & twelve cents ($54,238.12).

Wherefore the plaintiff demands judgment against the defendant for said sum of fifty-four thousand two hundred thirty-eight dollars & twelve cents (54,238.12) with interest at six per cent. from the thirty-first day of December, 1869, besides the cost of this action.

G. W. HAZELTON,
U. S. Att'y East. Dist. Wisc.

Amendment of complaint allowed by court, to wit: insert the following after the last count and before the prayer for judgment:

7 *Amendment to complaint.*

"And the complaint further shows that under the law of 1864 the the defendant became and was liable to pay the plaintiff the sum of 5 per cent. on all interest or coupons paid by the defendant on bonds prior to August 1st, 1870; and by the law of July 14, 1870, the defendant became & was liable to pay the plaintiff the sum of 2½ per cent. on interest or coupons paid by the defendant after August 1st, 1870, and during the year 1871, and that the amount so paid on Aug. 1, 1870, was $61,495, on which the tax due the United States, plaintiffs, was $3,074.75.

"That the amount paid after the last payment up to and including Aug. 1, 1871, was $106,697.02, on which the tax due the said plaintiff was $2,667 42

"That the amount earned by outstanding bonds ag't the defendant between Aug. 1, 1871, and Jan'y 1, 1872, was $43,686.43, on which the tax due the plaintiff was $1,092.16."

Whereupon a summons issued returnable according to law, with said complaint annexed, which summons is as follows:

8 Circuit court of the United States, for the eastern district of Wisconsin.

THE UNITED STATES OF AMERICA, PLAINTIFF,
vs.
THE WESTERN UNION RAILROAD COMPANY, defendant.

Summons on money demand. Complaint served.

The President of the United States of America to the above-named defendant:

You are hereby summoned and required to answer the complaint of the plaintiff in this action, which is filed in the office of the clerk of this court, at Milwaukee, in said district, and a copy of which is herewith served upon you. And you are also required to file your answer thereto in said clerk's office at Milwaukee, and to serve a copy thereof on the attorneys of the plaintiff whose name is subscribed hereto, at his office, in Milwaukee, Wis., within twenty days after the service of this summons on you, exclusive of the day of such service, and if you fail to answer the complaint as aforesaid, the plaintiff will take judgment against you for the sum of fifty-four thousand two hundred and thirty-eight dollars and twelve cents, with interest thereon from the 31st day of December, in the year one thousand eight hundred and sixty-nine, at six per cent. per annum, besides the costs of this action. The marshal of said district is hereby commanded to serve this summons and make due return thereto.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, at the city of Milwaukee, in the said eastern district of Wisconsin, this sixth day of November, in the year of our Lord one thousand eight hundred and seventy-five, and of the Independence of the United States the 100th.

[SEAL.] EDWARD KURTZ, *Clerk.*

G. W. HAZELTON,
U. S. Dist. Attorney.

9 *Return to summons.*

Summons & complaint returned:

Served on the within-named Western Union Railroad Co. by delivering to D. A. Olin, the superintendent of said road, personally, a copy of this summons and complaint this 9th day of November, A. D. 1875.

C. S. HAMILTON, *Marshal,*
By FRANK SCHNEIDER,
Deputy.

Fees, $5.00.

NOVEMBER 29, 1875.

This day came the defendant, by its attorney, Mr. John W. Cary, and filed its answer, as follows:

Answer.

Circuit court of the United States for the eastern district of Wisconsin.

THE UNITED STATES OF AMERICA
vs.
THE WESTERN UNION RAILROAD COMPANY.

The said defendant, by John W. Cary, its attorney, answering the said plaintiff's complaint, denies each and every statement or allegation and each and every matter and thing therein contained.

JOHN W. CARY.
Defendant's Attorney.

APRIL 19, 1876.

This day came the defendant, by its attorney, and filed its amended answer, as follows:

Amended answer.

United States circuit court for the eastern district of Wisconsin.

10 THE UNITED STATES OF AMERICA
vs.
THE WESTERN UNION RAILROAD COMPANY.

The said defendant amends its answer in this action by adding thereto by way of counter-claim, as follows:

And the said defendant, by way of counter-claim, says that the said plaintiff at the time of commencing this action was and now is indebted to the said defendant in the sum of five thousand dollars for money paid by said defendant to said plaintiff by mistake and inadvertence, and which the said defendant is entitled to recover from said plaintiff, and that said defendant will ask a judgment therefor in its favor against said plaintiff in this action.

JOHN W. CARY,
Defendant's Attorney.

And now, at this same term, to wit, January term, A. D. 1877, and on the seventieth day thereof, to wit, on the 26th day of March, A. D. 1877, the following proceedings were had, to wit:

Trial.

THE UNITED STATES OF AMERICA
vs.
THE WESTERN UNION RAILROAD COMPANY. } At law.

11 This day came the district attorney, Mr. G. W. Hazelton, and the defendant by its counsel, Mr. J. W. Cary, and the issues herein came on to be tried, when the said counsel in open court waived a jury and consented that the said issues be tried by the court.

Whereupon the court proceeded to try said issues, and the trial not being concluded, the same was adjourned until to-morrow morning.

And afterwards, to wit, on the 71st day of said term, to wit, on the

27th day of March, A. D. 1877, the following proceedings were had, to wit:

This day came the district attorney and the defendant by its counsel, Mr. Cary, and the trial of the issues herein was resumed by the court and concluded. And on consideration of the evidence and the arguments of counsel, the court finds the issues herein in favor of the plaintiff, and doth assess the damages to the United States, plaintiff, at the sum of five thousand nine hundred and thirty-three dollars and seventy cents.

And finding filed as follows:

Finding of the court.

Circuit court of the United States of America for the eastern district of Wisconsin.

THE UNITED STATES OF AMERICA
versus
THE WESTERN UNION RAILROAD COMPANY. } Finding.

12 The said circuit judge, having heard the testimony and arguments of counsel, finds as follows:

That the gross receipts of said defendant for passengers from and after the first day of August, 1862, until July 1st, 1864, amounted to the sum of $190,862.68, and that the said plaintiff was entitled to a tax of 3 per centum thereon, amounting to the sum of $5,725.91.

That the entire gross receipts of said company from and after the first day of July, 1864, until the first day of August, 1866, amounted to the sum of $1,427,685.36, and that said plaintiff was entitled to a tax thereon of 2½ per centum, amounting to the sum of $35,692.13.

That the gross receipts of said defendant from the fares of passengers from the first day of August, 1866, until the first day of January, 1870, amounted to the sum of $544,094.08, and that the gross receipts for transportation of the mails during the same time amounted to the sum of $61,676.01, together making the sum of $605,770.09.

That there was no evidence that said mail was carried upon a contract dated prior to August 1st, 1866, or upon any express contract, but from the fact that it was carried and compensation paid therefor, it is found that there was an implied contract, and therefore that said plaintiff was entitled to a tax of 2½ per centum upon said sum of
13 $605,770.09, amounting to $15,144.20.

That on or after August 1st, 1870, said defendant paid $61,495 interest on its bonded debt, which became payable August 1st, 1870, and that the plaintiff was entitled to a tax of 5 per centum on that amount, amounting to the sum of $3,074.75.

That on or after February 1st, 1871, said defendant paid $53,767.65 interest on its bonded debt, which became payable on the 1st day of February, 1871, upon which amount the plaintiff was entitled to a tax of 2½ per centum, amounting to the sum of $1,344.19.

That on or after the first day of August, 1871, the said defendant paid $52,929.37 interest upon its bonded debt, which became payable on said first day of August, 1871, upon which amount the plaintiff was entitled to a tax of $1,323.23.

And that on or after the first day of February, 1872, the said defendant paid $52,423.71 interest on its bonded debt, which became payable February 1st, 1872; and that said plaintiff was entitled to a tax on

5/8ths thereof, being the sum of $43,686.83, the tax thereon being $1,092.16.

That said taxes amount in all to the sum of $63,396.62; that said defendant has paid thereon the sum of $58,832.23, leaving a balance due the plaintiff of $4,564.39, and that the said plaintiff
14 entitled to interest on said last amount, from the first day of March, 1872, at 6 per centum, being the sum of $1,369.31, making together the sum of $5,933.70, for which said plaintiff is entitled to judgment in this action.

And it is further found, that said defendant made no net earning subject to tax in this suit, and that no interest was paid upon any of its bonds or the bonds of the Northern Illinois Railroad Company except the sum of $2,360.62 prior to the year 1870, and that no tax became due or payable on account of such interest, except on the said sum of $2,360.62, but that $3,866.66 was paid to the plaintiff as a tax on account of such interest on the 7th day of November, 1865, by the Northern Illinois Railroad Company; that said last named company was, on the first day of January, 1866, consolidated with and became a part of defendant company; and that said defendant company became its successor, and possessed of all its rights, interests, privileges, and franchises, and subject to its liabilities; but that said defendant is not entitled to have said sum of $3,866.66, or any part thereof, allowed as a set off against the claim of the plaintiff in this action.

Therefore judgment is directed in favor of the plaintiff and
15 against the defendant in this action for the sum of $5,933.70.

THOMAS DRUMMOND.

And afterwards, to wit, on the 81st day of said term, to wit, on the 7th day of April, A. D. 1877, the following proceedings were had, to wit:

Judgment.

THE UNITED STATES OF AMERICA
vs.
THE WESTERN UNION RAILROAD COMPANY. } At law.

This day came the district attorney, and on his motion it is considered and adjudged by this court now here that the United States of America do have and recover of the defendant, The Western Union Railroad Company, the sum of five thousand nine hundred and thirty-three dollars and seventy cents damages so as aforesaid assessed by the court, together with two hundred and thirty five dollars and forty-seven cents, the costs of the said United States about their said suit in this behalf by them expended, and that they have execution therefor.

Judgment roll signed April 7th, A. D. 1877.

EDWARD KURTZ, *Clerk.*

Damages, $5,933.70; costs, 235.47—$6,169.17.

Judgment roll filed April 7th, A. D. 1877, at five o'clock p. m.

EDWARD KURTZ, *Clerk.*

16 And same day (April 7, 1877) bill of exceptions signed and filed as follows:

Bill of exceptions.

Circuit court of the United States for the eastern district of Wisconsin.

THE UNITED STATES OF AMERICA
versus
THE WESTERN UNION RAILROAD COMPANY.

Afterwards, to wit, on the 26th day of March, A. D. 1877, the issue so as aforesaid joined came on to be tried at a circuit court held at the court room in the city of Milwaukee, in said district, before the honorable Thomas Drummond, circuit judge, without a jury, G. W. Hazelton, esq., district attorney for the United States, appearing for the plaintiff, and John W. Cary for the defendant.

And the said plaintiff, to maintain said issue on its part, introduced statements from the books of the said defendant, which were admitted to be true, from which it appeared that the gross amount of all receipts of said railroad for the transportation of passengers over and upon said railroad, between the first day of August, 1862, and the first day of July, 1864, was the sum of $190,863.68.

It further appeared that the entire gross receipts of said company from and after the 30th day of June, 1864, until the first of August,
17 1866, were the sum of $1,427,685.36. And it further appearing from said statements that the gross receipts of the defendant for fares of passengers and for carrying the mails, from the first day of August, 1866, until January 1st, 1870, were the sum of $605,770.09, and that of the said last amount the sum of $61,676.01 were for the carriage of the mails, and the balance of said sum, $544,094.08, was for passenger fares.

It further appears, from the books of said company, that there were no net earnings of said company subject to tax in this suit. That there appeared therein entries crediting the agent of the bondholders of said road with interest on bonds of the Northern Illinois Railroad, from July first to December thirty first, 1864, the sum of $38,876.00, and from January 1st to December 31st, 1865, a like credit to the agent of the bondholders for interest on Northern Illinois Railroad bonds, $33,648.54; and in the year 1866 a like credit to the agent of the bondholders for interest on Northern Illinois Railroad bonds, $24,372.25; upon which the said plaintiff claimed the government was entitled to a tax of five per centum. It further appears from said books that on the first day of August, 1870, interest on the bonded debt of the company to the amount of $61,495 fell due, and that the same was paid by said company on or after said date.

18 And it further appeared that on the first day of Feburary, 1871, interest on the bonded debt of said company became due and payable to the amount of $53,767.65, and that the same was paid on or after that date, and that the further sum of $52,929.37 became due and payable on the bonds of said company on the 1st day of August, 1871, and that it was paid on or after that date by said company.

The said plaintiff, to maintain the issue on his part, offered to show by said books that on the first of February, 1872, the further sum of $52,423.71 became due and payable on the said bonds of said company, and that the said amount was paid on or after said date, to which the defendants' counsel then and there objected that said evidence was incompetent and immaterial. The court overruled said objection and the defendant's counsel then and there excepted. And the said plaint-

iff's counsel then showed that the sum of $52,423.71 so became due and payable on said first day of February, 1872, and that the same was paid on or after that date, and claimed and insisted that the plaintiff was entitled to a tax of 2½ per centum on $\frac{5}{6}$ths of said amount.

The plaintiff then rested, and the defendant to maintain said
19 issue on its part called as a witness F. G. Ranney, who was sworn and testified that he was secretary and treasurer of said company and had charge of its books and papers; and that he had charge of the books of said company as their bookkeeper from the 22nd February, 1866.

He further testified that he had examined the books of the company, and also the papers and files of the said co., and found no reference to any contract for carrying the mails on the said books, and no contract among the papers of the co., and that so far as he could ascertain from such examination no such contract was ever made, and that he had no knowledge of such contract.

He further testified that that portion of the road between Freeport and Savannah was known and called as the Northern Illinois Railroad, and that the bonds mentioned as Northern Illinois Railroad bonds were bonds issued on that road; that said road was a part of the road operated by the Racine and Mississippi Railroad, and that it was consolidated with the Western Union Railroad in January, 1866, and that all of the earnings of said road for the whole time mentioned in the complaint in this cause are included in the books of the company; and that on the consolidation of said company with the Western Union Railroad Company the said defendant Western Union Railroad
20 Company succeeded to all its rights, privileges, franchises, and liabilities.

That said entries in said books of interest paid on bonds of Northern Illinois Railroad, to wit, $38,876.00, $33,648.54, and $24,372,25, were made for the purpose of showing the relative rights of the bondholders of the different portions of the entire road, and that in fact no interest was ever paid upon such bonds, except the sum of $2,360.67, and that said accounts still remain open and unsettled upon said books, and that there never was any net earnings of said company to pay interest on said bonds, and that no such interest was ever paid. But at the time of the change of management July 1st, 1869, he understood the said bonds were arranged or settled in some way, but the witness is unadvised as to the terms of such arrangement.

And the said defendant, further to maintain the issue on his part, then and there introduced in evidence vouchers for payments of taxes made by said defendant, amounting to the sum of $58,832.23, which vouchers show the payments made from month to month to the collector of internal revenue for the district in which defendant's office was located, including taxes on account of receipts for transportation of mails.

21 The said defendant also offered and read in evidence in addition thereto a voucher in the words and figures following, to wit:

(Official.)

TREASURY DEPARTMENT,
OFFICE OF INTERNAL REVENUE,
$3,866.66.] *Washington, November 7th*, 1865.

Rec'd from Northern Illinois Railroad Company, by the letter of first instant, 3,866.66 dollars in certificate of deposit 689, issued by First Na-

tional Bank, Milwaukee, on account of internal revenue tax on interest on bonds.

C. H. PARSONS,
Cashier Internal Revenue.

TREASURER NORTHERN ILLINOIS RAILROAD COMPANY,
Racine, Wis.

THE FIRST NATIONAL BANK OF MILWAUKEE,
MILWAUKEE, WIS.,
Milwaukee, Nov. 1st, 1865.

$3,866.66.]

I certify that The Northern Illinois Railroad Co. has this day deposited to the credit of the Treasurer of the United States thirty-eight hundred sixty-six $^{66}_{100}$ dollars, on account of internal revenue for taxes on coupons, for which I have signed triplicate receipts.
No. 689.

H. H. CAMP, *Cash'r.*

(Across the face:) Triplicate.

(This will be retained by the depositor for his own use and security.)
1865, Nov. 1st. Government tax.
22 To cash, $3,866.66.

Amount paid this day by dr'ft on N. Y. to T. J. Emerson, coll., for tax on coupons rem'ning due Oct. 1, '63, to Aug. 1, '65.—W. V. B.

August	1, 1865.	Tax	.....	$666 66
April	1, "	"	.....	1,000 00
Oct.	1, 1864.	"	.....	1,000 00
April	1, "	"	.....	600 00
Oct.	1, 1873.	"	.....	600 00

And the foregoing is all the testimony given on said trial.

And the said defendant then and there asked that said defendant should be credited in this suit as against the claims proven by the said plaintiff the said amount of $3,866.66, as mentioned in said voucher, but the said circuit judge did then and there give his opinion and rule and decide that as no interest was, in fact, ever paid on said bonds of the Northern Illinois Railroad Company, no tax was ever due or payable thereon, but inasmuch as said $3,866.66 had been paid on account of such tax, said defendant was not entitled to have credit allowed therefor in this suit, and did then & there refuse to allow the same to defendant, to which ruling and decision the said defendant's counsel did then and there except.

23 And the said defendant's counsel did then and there further request said circuit judge to rule and decide that said plaintiff was not entitled to a tax of 2½ per centum upon the said sum of $61,676.61 received by said company for transportation of the mails from July 1st, 1866, to January 1st, 1870, but the said circuit judge did then and there refuse so to rule and decide, but on the contrary did give his opinion and rule and decide that, although there was no evidence of a contract bearing date prior to August 1st, 1866, & no proof of an express contract, yet as the mails were carried and compensation received therefor the law would imply a contract, and therefore that said plaintiff was entitled to said tax on said amount, to which ruling and decision the said defendant's counsel did then and there except.

And the said defendant's counsel did then and there further request said circuit judge to rule and decide that said plaintiff was not entitled to a tax of five per centum upon the amount of $61,495.00, the amount of interest paid on the bonds of the company on or after the first day of August, 1870, but that a tax of only 2½ per centum was due thereon, but said circuit judge refused so to rule and decide, but on the
24 contrary did rule and decide that said plaintiff was entitled to a tax thereon of 5 per centum, to which ruling and decision the said defendant's counsel did then and there except.

And the said defendant's counsel did then and there further request said circuit judge to rule and decide that said plaintiff was not entitled to a tax of 2½ per centum on $\frac{5}{6}$ths of $52,423.71, the amount of interest paid on the bonds of the company on or after February 1st, 1872, but the said circuit judge did then and there refuse so to rule and decide, and on the contrary did then and there rule and decide that said plaintiff was entitled to a tax of 2½ per centum on $\frac{5}{6}$ths of said amount, to which ruling and decision said defendant's counsel did then and there except.

And because none of said objections, rulings, decisions, and exceptions, so as aforesaid made, appear in the record and proceedings of the trial of this cause, the said defendant's counsel has caused this bill of exceptions to be prepared, signed, and sealed by the said circuit judge this seventh day of April, A. D. 1877.

THOMAS DRUMMOND.

JUNE 5, 1877.

This day came the defendant, by its attorney, and filed its bond,
25 with Alexander Mitchell and Sherburn S. Merril, as sureties, in the sum of fifteen thousand dollars, conditioned to prosecute a writ of error to effect and answer all damages and costs if it shall fail to make its plea good, which bond is approved by the district judge, and is as follows:

Bond.

Know all men by these presents, that we, the Western Union Railroad Company as principal and Alexander Mitchell and Sherburne S. Merrill as sureties, are held and firmly bound unto the United States of America in the sum of fifteen thousand dollars, to be paid to the said United States of America, to which payment well and truly to be made we bind ourselves, and each of us, jointly and severally, and our and each of our heirs, executors, and administrators firmly by these presents, sealed with our seals and dated this fifth day of June, A. D. 1877.

Whereas lately, at a term of the circuit court of the United States for the eastern district of Wisconsin, in a suit depending in said court between the United States of America as plaintiff, and the Western Union Railroad Co. as defendant, judgment was rendered against the said Western Union Railroad Company, and the said Western Union Railroad Company being about to prosecute a writ of error to
26 the Supreme Court of the United States to reverse said judgment:

Now, therefore, the condition of this obligation is such that if the above-named Western Union Railroad Company shall prosecute said writ of error to effect and answer all damages and costs if it

shall fail to make good its appeal or plea, then this obligation shall be void, otherwise to remain in full force and virtue.

For the WESTERN UNION RAILROAD CO.,
[SEAL.] By ALX. MITCHELL, *Pr't.*
F. G. RANNEY, *Secretary.*
ALX. MITCHELL.
S. S. MERRILL.

Sealed, signed, and delivered in the presence of—
MELBERT B. CARY.

EASTERN DISTRICT OF WISCONSIN,
Milwaukee County, ss:

Alexander Mitchell, being duly sworn, says that he is worth the sum of fifteen thousand dollars over and above all his debts and liabilities, and above all property exempt from execution under the laws of the State of Wisconsin.

ALX. MITCHELL.

Subscribed & sworn to before me this fifth day of June, 1877.
[SEAL.] MELBERT B. CARY,
Notary Public, Wis.

EASTERN DISTRICT OF WISCONSIN,
Milwaukee County, ss:

S. S. Merrill, being duly sworn, says that he is worth the sum
27 of fifteen thousand dollars over and above all his debts and liabilities, and above all property exempt from execution under the laws of the State of Wisconsin.

S. S. MERRILL.

Subscribed & sworn to before me this sixth day of June, A. D. 1877.
[SEAL.] MELBERT B. CARY,
Notary Public, Mil. Co., Wis.

(Endorsed:)
This bond approved this 5th June, 1877.

CHAS. E. DYER.
Judge.

Whereupon it is ordered that execution be superseded, and a writ of errer and citation issued, and a copy of said writ of error lodged for the defendant in error.

28 UNITED STATES OF AMERICA,
Eastern District of Wisconsin, ss:

I, Edward Kurtz, clerk of the circuit court of the United States of America for the eastern district of Wisconsin, do hereby certify that I have compared the writings annexed to this certificate, and they are true copies of their respective originals, and are correct transcripts therefrom now on file and remaining of record in my office, being a full and complete transcript of record in the case of The United States vs. The Western Union Railroad Company.

In testimony whereof I have hereunto set my hand and duly affixed the seal of the said court, at the city of Milwaukee, in said district, this 21st day of September, in the year of our Lord one thousand eight hun-

dred and seventy-seven, and of the Independence of the United States the 102nd.

[SEAL.] EDWARD KURTZ, *Clerk.*

29 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States of America for the eastern district of Wisconsin, greeting:

Because in the record and proceedings, as also in the rendition of a judgment in a plea which is in the said circuit court of the United States of America for the eastern district of Wisconsin, before you, between The United States of America, plaintiff, and The Western Union Railroad Company, defendant, a manifest error hath happened, to the great damage of the said The Western Union Railroad Company, as by the complaint appears, and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error that of right and according to law and custom of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court of the United States, this fifth day of June, in the year of our Lord one thousand eight hundred and seventy-seven, and of the Independence of the United States the 101st.

[SEAL.] EDWARD KURTZ,
Clerk U. S. Circuit Court, East. Dist. Wis.

(Indorsed:) Filed June 5th, 1877. Edw. Kurtz, clerk.

30 THE UNITED STATES OF AMERICA, *ss:*

To the United States of America, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to writ of error filed in the clerk's office of the circuit court of the United States for the eastern district of Wisconsin, wherein the Western Union Railroad Company is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court of the United States, at the city of Milwaukee, in the said district, this 5th day of June, A. D. 1877, and of our Independence the 101st.

[SEAL.] CHARLES E. DYER,
Dist. Judge.

shall fail to make good its appeal or plea, then this obligation shall be void, otherwise to remain in full force and virtue.

For the WESTERN UNION RAILROAD CO.,
[SEAL.] By ALX. MITCHELL, *Pr't.*
F. G. RANNEY, *Secretary.*
ALX. MITCHELL.
S. S. MERRILL.

Sealed, signed, and delivered in the presence of—
MELBERT B. CARY.

EASTERN DISTRICT OF WISCONSIN,
Milwaukee County, ss:

Alexander Mitchell, being duly sworn, says that he is worth the sum of fifteen thousand dollars over and above all his debts and liabilities, and above all property exempt from execution under the laws of the State of Wisconsin.

ALX. MITCHELL.

Subscribed & sworn to before me this fifth day of June, 1877.
[SEAL.] MELBERT B. CARY,
Notary Public, Wis.

EASTERN DISTRICT OF WISCONSIN,
Milwaukee County, ss:

S. S. Merrill, being duly sworn, says that he is worth the sum
27 of fifteen thousand dollars over and above all his debts and liabilities, and above all property exempt from execution under the laws of the State of Wisconsin.

S. S. MERRILL.

Subscribed & sworn to before me this sixth day of June, A. D. 1877.
[SEAL.] MELBERT B. CARY,
Notary Public, Mil. Co., Wis.

(Endorsed:)
This bond approved this 5th June, 1877.

CHAS. E. DYER,
Judge.

Whereupon it is ordered that execution be superseded, and a writ of errer and citation issued, and a copy of said writ of error lodged for the defendant in error.

28 UNITED STATES OF AMERICA,
Eastern District of Wisconsin, ss:

I, Edward Kurtz, clerk of the circuit court of the United States of America for the eastern district of Wisconsin, do hereby certify that I have compared the writings annexed to this certificate, and they are true copies of their respective originals, and are correct transcripts therefrom now on file and remaining of record in my office, being a full and complete transcript of record in the case of The United States vs. The Western Union Railroad Company.

In testimony whereof I have hereunto set my hand and duly affixed the seal of the said court, at the city of Milwaukee, in said district, this 21st day of September, in the year of our Lord one thousand eight hun-

dred and seventy-seven, and of the Independence of the United States the 102nd.

[SEAL.] EDWARD KURTZ, *Clerk.*

29 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States of America for the eastern district of Wisconsin, greeting:

Because in the record and proceedings, as also in the rendition of a judgment in a plea which is in the said circuit court of the United States of America for the eastern district of Wisconsin, before you, between The United States of America, plaintiff, and The Western Union Railroad Company, defendant, a manifest error hath happened, to the great damage of the said The Western Union Railroad Company, as by the complaint appears, and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error that of right and according to law and custom of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court of the United States, this fifth day of June, in the year of our Lord one thousand eight hundred and seventy-seven, and of the Independence of the United States the 101st.

[SEAL.] EDWARD KURTZ,
Clerk U. S. Circuit Court, East. Dist. Wis.

(Indorsed:) Filed June 5th, 1877. Edw. Kurtz, clerk.

30 THE UNITED STATES OF AMERICA, *ss:*

To the United States of America, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to writ of error filed in the clerk's office of the circuit court of the United States for the eastern district of Wisconsin, wherein the Western Union Railroad Company is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court of the United States, at the city of Milwaukee, in the said district, this 5th day of June, A. D. 1877, and of our Independence the 101st.

[SEAL.] CHARLES E. DYER,
Dist. Judge.

I accept service of the above citation this 11th day of August, A. D. 1877.

G. W. HAZELTON,
U. S. Att'y, &c.

(Indorsement on cover:) No. 287. The Western Union Railroad Company, pl'ff in error, vs. The United States. E. Wisconsin C. C. U. S. Filed 13th October, 1877.

OFFICE SUPREME COURT U. S.
FILED
APR 5 1880
D. W. MIDDLETON, Clerk.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1879.

THE WESTERN UNION RAILROAD COMPANY,
PLAINTIFF IN ERROR,

vs.

THE UNITED STATES OF AMERICA,
DEFENDANT IN ERROR.

STATEMENT, ASSIGNMENT OF ERROR,

AND

BRIEF FOR PLAINTIFF IN ERROR.

JOHN W. CARY,
Solicitor.

MILWAUKEE:
CRAMER, AIKENS & CRAMER, LEGAL PRINTERS, COR. MILWAUKEE AND MICHIGAN STS.
1880.

Supreme Court of the United States.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES,
FOR THE EASTERN DISTRICT OF WISCONSIN.

THE WESTERN UNION RAILROAD COMPANY,
PLAINTIFF IN ERROR,
vs.
THE UNITED STATES OF AMERICA,
DEFENDANT IN ERROR.

No. 287.
Oct. Term, 1879.

This is an action brought by the United States of America in the Circuit Court for the Eastern District of Wisconsin, to recover certain internal revenue taxes alleged to have accrued from August 1st, 1862, to December 31st, 1871.

The defendant railroad, at different times during this period, was known as the Racine & Mississippi Railroad, the Northern Illinois Railroad, and the Western Union Railroad.

The complaint first counts upon the statute of July 1st, 1862, which was in force from August 1st, 1862, to July 1st, 1864, and required the payment of three per cent. on the gross amount of all receipts from passengers, and

alleges that defendant's earnings during that period, from that source, were $190,863.68, upon which there was a tax of $5,725.

It next counts upon the act of June 30th, 1864, and alleges that from July 1st, 1864, to August 1st, 1866, a tax of 2½ per cent. of its entire gross receipts was due plaintiff, and that during that period defendant's gross receipts were $1,457,699.39, and that the tax thereon was $36,442.48.

The complaint next counts upon the act which took effect August 1st, 1866, and continued until January 1st, 1870, and which required the payment of 2½ per cent. on the gross receipts for carrying passengers and mails. That such receipts were $605,770.09, and that the tax thereon was $15,144.20.

The complaint then counts upon the act of June 30th, 1864, requiring the payment of 5 per cent. on all coupons and profits up to January 1st, 1870, which it alleges were $793,711.14 and the tax thereon, $39,685.55, and then alleged the total of all these taxes was $96,997.23, of which the defendant had paid $42,759.11, and claimed judgment for $54,238.12.

On the trial the plaintiff was allowed to amend its complaint, by an addition thereto, so as to count upon the act of July 14th, 1870, by which 2½ per cent. was required to be paid on interest and coupons after August 1st, 1870 and during the year 1871, that the amount so paid, on interest and coupons August 1st 1870, was $61,495 upon which was a tax of $3,074.75. That the amount paid after August 1st, 1870, up to and including August 1st, 1871, was $106,697.02, on which there was a tax of $2,667.42; and that the amount earned by outstanding bonds against defendant, between August 1st, 1871, and January 1st, 1872, was $43,686.43, on which the tax was $1,092.16. (Record, pp. 2 and 3).

The defendant denied each and every allegation of the complaint (Record, p. 5), and subsequently amended its answer by pleading a counter claim in the sum of five thousand dollars for moneys paid the plaintiff by mistake and inadvertence and asked a judgment in its favor.

The trial was by the court, without a jury, and judgment was rendered for plaintiff for $5,933.70. (Record, pp. 5 and 6.)

The court made a special finding, from which it appears that the earnings under the first count were	$ 190,862.68	Tax @ 3 Per Cent.,	$5,725.91
Under the second count the receipts were	1,427,685.36	Tax @ 2½ Per Cent.	35,692.13
Under the third count the gross receipts for fares of passengers	544,094.08		
For mails	61,676.01		
	$605,770.09	Tax @ 2½ Per Cent.	15,144.20

That there was no evidence that said mail was upon a contract, dated prior to August 1st, 1866, or upon any express contract, but from the fact that it was carried and compensation paid therefor it is found that there was an implied contract, and therefore

that plaintiff was entitled to a tax thereon. The court further found upon the matters alleged in the amendment to the complaint that, on or after August 1st, 1870 defendant paid interest which became due August 1st, 1870.....	61,495.00	Tax @5 Per Cent.,	3,074.75
That on or after February 1st, 1871 defendant paid interest on bonded debt which became due on that date	53,767.65	Tax @2½ Per Cent.,	1,344.19
That on or after August 1st, 1871 defendant paid interest on its bonded debt which became due August 1st,	52,929.37	Tax @2½ Per Cent.,	1,323,23
That on or after February 1st, 1872 defendant paid interest on its bonded debt which became payable February 1st, 1872, and that plaintiff was entitled to a tax on $\frac{5}{6}$ thereof....	52.423.71	Tax 2½ Per Ct. on $\frac{5}{6}$	1,092.16
The court further found that all of said taxes amounted to			63,396.62

The defendant had paid thereon	58,832.23
Leaving a balance due plaintiff of.....	4,564.39
And that plaintiff was entitled to interest thereon from March 1st, 1872 at 6 per cent	1,369.31
Making together the sum of.....	5,933,70

"It is further found that defendant made no net earnings subject to tax in this suit, and that no interest was paid upon any of its bonds or the bonds of the Northern Illinois Railroad Company except the sum of $2,360.62 prior to the year 1870, and that no tax became due or payable on account of such interest except on the said sum of $2,360.62, but that $3,866.66 was paid to the plaintiff as a tax on account of such interest on the 7th day of November, 1865, by the Northern Illinois Railroad Company. That said last named company was on the first day of January 1866, consolidated with and became a part of defendant company; and that said defendant company became its successor and possessed of all its rights, interests, privileges and franchises and subject to its liabilities, but that said defendant is not entitled to have said sum of $3,866.66 or any part thereof allowed as a set off against the claim of the plaintiff in this action. Therefore judgment is directed in favor of the plaintiff and against the defendant in this action for the sum of $5,933.70." (Record, pp. 6 and 7).

A bill of exceptions was duly tendered, signed and filed. (Record, pp. 8, 9, 10 and 11).

Assignment of Errors.

1st. The Court erred in refusing to allow the sum of $3,866.66 paid on the 7th of November, 1865, by the Northern Illinois Railroad Company, to be credited to the account of the defendant.

2nd. The Court erred in ruling and deciding that a tax of 2½ per centum was due the plaintiff on the sum of $61,676.61, received by the defendant for transportation of the mails from July 1st, 1866, to January 1st, 1870.

3d. The Court erred in ruling that a tax of five per centum was due plaintiff upon the amount of $61,495 of interest paid on the bonds of the company on or after August 1st, 1870.

4th. The Court erred in admitting evidence to show that the sum of $52,423.71 became due and payable for interest on the bonds of the defendant on the first day of February 1872, and that the same was paid.

5th. The Court erred in ruling and deciding that a tax of 2½ per centum was due the plaintiff on ⅘ of the amount of interest paid on its bonded debt on the first day of February, 1872.

I.

The Court erred in refusing to allow the sum of $3,866.66 paid on the 7th of November, 1865, by the Northern Illinois Company to be credited to the account of the defendant.

The Court expressly found that said defendant made no net earnings subject to tax in this suit, and further, that

no interest was paid upon any of its bonds or the bonds of the Northern Illinois Railroad Company, except the sum of $2,360.62, prior to the year 1870, and that no tax became due or payable on account of said interest, except on the said sum of $2,360.62. But the Court also found that $3,866.66 was paid to the plaintiff as a tax on account of such interest, on the 7th day of November, 1865, by the Northern Illinois Railroad Company. That said last named Company was on the first day of January, 1866, consolidated with and became a part of the defendant company, and that said defendant company became its successor and possessed of all its rights, interest, privileges and franchises, and subject to all its liabilities; and the Court then say that said defendant is not entitled to have said sum of $3,866.66, or any part thereof, allowed as a set-off against the claim of the plaintiff in this action.

This was manifest error.

There is no dispute that this amount was paid to the plaintiff through mistake; that there was no debt or tax against the company which required such payment. It further appeared (see Bill of Exceptions, Record, p. 9) that this Northern Illinois Railroad was a portion of the Racine and Mississippi Railroad; that it was consolidated with the Western Union Railroad in January, 1866, and that all the earnings of said Northern Illinois Railroad for the whole time mentioned in the complaint in this cause, are included in the accounts of the said Racine and Mississippi Railroad and Western Union Railroad. It was operated by the Racine and Mississippi Railroad at the time this payment was made, and all its earnings of every kind went into the accounts which are proved in this case and make up the sum upon which the tax recovered herein was

Assignment of Errors.

1st. The Court erred in refusing to allow the sum of $3,866.66 paid on the 7th of November, 1865, by the Northern Illinois Railroad Company, to be credited to the account of the defendant.

2nd. The Court erred in ruling and deciding that a tax of 2½ per centum was due the plaintiff on the sum of $61,676.61, received by the defendant for transportation of the mails from July 1st, 1866, to January 1st, 1870.

3d. The Court erred in ruling that a tax of five per centum was due plaintiff upon the amount of $61,495 of interest paid on the bonds of the company on or after August 1st, 1870.

4th. The Court erred in admitting evidence to show that the sum of $52,423.71 became due and payable for interest on the bonds of the defendant on the first day of February 1872, and that the same was paid.

5th. The Court erred in ruling and deciding that a tax of 2½ per centum was due the plaintiff on ⅘ of the amount of interest paid on its bonded debt on the first day of February, 1872.

I.

THE COURT ERRED IN REFUSING TO ALLOW THE SUM OF $3,866.66 PAID ON THE 7TH OF NOVEMBER, 1865, BY THE NORTHERN ILLINOIS COMPANY TO BE CREDITED TO THE ACCOUNT OF THE DEFENDANT.

The Court expressly found that said defendant made no net earnings subject to tax in this suit, and further, that

no interest was paid upon any of its bonds or the bonds of the Northern Illinois Railroad Company, except the sum of $2,360.62, prior to the year 1870, and that no tax became due or payable on account of said interest, except on the said sum of $2,360.62. But the Court also found that $3,866.66 was paid to the plaintiff as a tax on account of such interest, on the 7th day of November, 1865, by the Northern Illinois Railroad Company. That said last named Company was on the first day of January, 1866, consolidated with and became a part of the defendant company, and that said defendant company became its successor and possessed of all its rights, interest, privileges and franchises, and subject to all its liabilities; and the Court then say that said defendant is not entitled to have said sum of $3,866.66, or any part thereof, allowed as a set-off against the claim of the plaintiff in this action.

This was manifest error.

There is no dispute that this amount was paid to the plaintiff through mistake; that there was no debt or tax against the company which required such payment. It further appeared (see Bill of Exceptions, Record, p. 9) that this Northern Illinois Railroad was a portion of the Racine and Mississippi Railroad; that it was consolidated with the Western Union Railroad in January, 1866, and that all the earnings of said Northern Illinois Railroad for the whole time mentioned in the complaint in this cause, are included in the accounts of the said Racine and Mississippi Railroad and Western Union Railroad. It was operated by the Racine and Mississippi Railroad at the time this payment was made, and all its earnings of every kind went into the accounts which are proved in this case and make up the sum upon which the tax recovered herein was

levied; and that by the consolidation with the defendant, the defendant became entitled to all its rights, franchises and choses in action.

It is therefore a clear case of a payment to the plaintiff by mistake, which should be refunded or accounted for by the Government.

The plaintiff treats this part of the road as a part of the Racine and Mississippi Railroad, and has proved its earnings as a part of the receipts of that company for the whole period for which such taxes were assessed, and has recovered the tax on such earnings.

The complaint treats the defendant as indebted on an open account from July 1st, 1862, up to the first day of January, 1872, and charges it with all of the earnings made by either the Racine and Mississippi Company or the Northern Illinois Company, and by the Western Union Company. This payment was made on account of taxes supposed to be due on this property which the court finds were not due, and it was error in the Court to refuse to credit the defendant with the amount paid.

II.

THE COURT ERRED IN RULING AND DECIDING THAT A TAX OF $2\frac{1}{2}$ PER CENTUM WAS DUE PLAINTIFF ON THE SUM OF $61,676.61 RECEIVED BY THE DEFENDANT FOR TRANSPORTATION OF THE MAILS FROM JULY 1ST, 1866, TO JANUARY 1ST, 1870.

Chapter 184 of the laws of 1866, approved July 13, 1866, provides that Section 103, of the act of June 30, 1864, should be repealed, and in lieu thereof, provided,

that: "every person, firm, company or corporation owning "or possessing, or having the care or management of any "railroad, canal, steamboat, ship, barge, canal-boat, or "other vessel or any stage coach, or other vehicle, except "hacks or carriages not running on continuous routes, en- "gaged or employed in the business of transporting "passengers for hire, or *in transporting the mails of the "United States upon contracts made prior to August 1st*, 1866, "shall be subject to and pay a tax of two and one-half per "cent. of the gross receipts from passengers and mails" so carried.

The Court found in this case that there was no evidence that said mail was carried upon a contract dated prior to August 1st, 1866, or upon any express contract, but from the fact that it was carried and compensation paid therefor, it is found that there was an *implied* contract; that therefore plaintiff was entitled to a tax of $2\frac{1}{2}$ per centum upon said sum of $61,676.01. By the statute the tax was levied on the receipts for carrying mails only when such mail was carried on contracts made prior to August 1st, 1866, and if no such contract existed, with this company, no tax could be levied on the receipts for the transportation of the mails. It is well known that there are two kinds of service in the Post Office Department, namely: contract service and "recognized service." There is no such thing as an implied contract in the post office service. All contracts are in writing and no service is regarded as contract service except where there is a written contract between the Government and the person or company transporting the mail. All other service comes under the head of "recognized service," and such service was not taxable under this statute.

The Court therefore was in error in holding that these receipts were taxable on the ground that an implied

contract would be presumed. It was necessary for the plaintiff to show that these mails were transported under a contract bearing date prior to August 1st, 1866, before any tax could be levied thereon.

There is no pretence that any such contract was made, but on the contrary, it was negatively shown that no such contract existed.

III.

THE COURT ERRED IN RULING THAT A TAX OF FIVE PER CENTUM WAS DUE PLAINTIFF UPON THE AMOUNT OF $61,495 OF INTEREST PAID ON THE BONDS OF THE COMPANY ON OR AFTER AUGUST 1st, 1870.

The act of June 30th, 1864, provided for a tax of five per cent. on all net earnings, and it has so been ruled by the Courts and administered by the Department. The fact that interest was paid upon coupons might be considered as *prima facie* evidence that net earnings had been made by the Company, but in this case the Court has found affirmatively that no net earnings were made by this Company subject to taxation in this suit.

That presumption is rebutted therefore in this case.

But as there were no net earnings there could be no tax levied on account of the payment of coupons.

IV.

THE COURT ERRED IN ADMITTING EVIDENCE TO SHOW THAT THE SUM OF $52,423.71 BECAME DUE AND PAYABLE FOR INTEREST ON THE BONDS OF THE DEFENDANT ON THE FIRST DAY OF FEBRUARY, 1872, AND THAT THE SAME WAS PAID.

This inquiry was wholly irrelevant. The law levying the tax expired with the year 1871, and it mattered not what debts of the Company became due in 1872. It was error to admit this proof.

V.

THE COURT ERRED IN RULING AND DECIDING THAT A TAX OF $2\frac{1}{2}$ PER CENTUM WAS DUE THE PLAINTIFF ON FIVE-SIXTHS OF THE AMOUNT OF INTEREST PAID ON DEFENDANT'S BONDED DEBT ON THE FIRST DAY OF FEBRUARY, 1872.

It was proved, under objection from defendant's counsel, that on the 1st day of February, 1872, the defendant paid $52,423.71 interest on its bonded debt which became payable February 1st, 1872, and the Court below found that the plaintiff was entitled to a tax on five-sixths of this amount, being the sum of $43,686.83, and that the tax thereon was $1,092.16. We have already stated that the Court found that there were no net earnings of this company subject to taxation. The payment of this interest, therefore, on the first of February, 1872, raised no presumption that any such net earnings had been made. On the contrary, such presumption is expressly rebutted by the finding of the Court. But there was never any law that authorized the levying of a tax on account of the payment of coupons after the last day of December, 1871, however it might have been in years previous. It was error, therefore, in the Court below to give judgment for a tax on account of such payment made on the first of February, 1872, and for these reasons, the judgment should be reversed.

JOHN W. CARY,
Of Counsel.

March 30th, 1880.

In the Supreme Court of the United States.

OCTOBER TERM, 1879.

THE WESTERN UNION RAILROAD COMPANY, PLAINTIFF IN ERROR,
vs.
THE UNITED STATES.
} No. 287.

BRIEF FOR THE UNITED STATES.

In the Supreme Court of the United States.

OCTOBER TERM, 1879.

THE WESTERN UNION RAILROAD Company, plaintiff in error, *vs.* THE UNITED STATES. } No. 287.

BRIEF FOR THE UNITED STATES.

This was an action by the United States to recover taxes due by the company upon gross receipts, profits, coupons, &c., during several years ending January 1, 1872.

The company pleaded the general issue, and also a counter-claim.

The case was *tried by the court*, under stipulation, and a special finding of facts appears upon the record, p. 6. Upon these findings judgment was entered in favor of the United States for $5,933.70.

Four exceptions were made to the following rulings of the court:

1. Disallowing a set-off of $3,866.66 theretofore paid by the company for a tax upon certain payments alleged to have been made by it upon certain bonds; whereas no such payments had been made, and consequently no such tax had been due. (Folio 22.)

2. That tax was due upon money ($61,676.61) received by the company for transportation of the mails from August 1, 1866, to January 1, 1870, holding in that connection, "that although there was no evidence of a contract bearing date prior to August 1, 1866, and no proof of an express contract, yet as the mails were carried and compensation received therefor, the law would imply a contract, and therefore that said plaintiff was entitled to said tax on said amount; to which ruling and decision the said defendant's counsel did then and there except."

3. That tax at the rate of *five* (instead of *two and a half*) per centum was due upon interest paid upon bonds of the company on and after the 1st of August, 1870.

4. That 2½ per centum was due upon ⅝ths of the amount of interest paid upon bonds of the company on and after February 1, 1872.

1. *As to the claim of set-off:*

Section 3220 of the Revised Statutes authorizes the Commissioner of Internal Revenue "on appeal to him made to remit, refund, and pay back all taxes erroneously or illegally assessed or collected * * * or in any manner wrongfully collected."

The principle involved in section 951 requires that the forms of 3220 shall have been resorted to before a credit or set-off of the sort now in question can be claimed against the United States in a suit at law. This is the only way in which the United States have allowed themselves to be questioned in their ordinary courts about such matters.

2. As to the tax upon the money received for mail transportation:

Since 1845 the Postmaster-General has been authorized to contract with railroad companies for carrying

the mail without previous advertisement. (5 Stat., 738, 796.)

The circumstances under which alone a railroad company could carry the United States mail for *three and a half years*, are at least as pertinent in *implying a contract* for that purpose, as, for like purposes, were the quartermaster's *receipt and use of the corn*, in Salomon's case (19 Wall., 17). Other cases concur in showing that the United States may be liable *as upon an implied contract*, for benefits received by services that have been performed. (Knote's case, 95 U. S., at p. 156; Clark's case, *ibid*, at p. 552.)

At all events a company which has dealt with the Post-Office Department *as if* under a contract with the United States, and taken public money from them under the same theory, cannot, in a case like the present, be heard to say that no such contract existed.

3. Upon the question whether a tax of five per centum was due on account of coupons paid on and after August 1, 1870, the case of Railroad *vs.* Rose (95 U. S., 78), and that of Stockdale (20 Wall., 328), seem to be conclusive.

4. As interest is due *de die in diem*, it appears that the Statute of 1870, c. 255, sec. 15 (16 Stat., 260), fully authorizes the ruling as regards the tax upon $\frac{5}{6}$ths of the interest paid on bonds on and after February 1, 1872. The material words of the statute are: "There shall be levied and collected for and during the year 1871, a tax of $2\frac{1}{2}$ per centum on the amount of all interest or coupons paid on bonds or other evidence of debt issued and payable *by any railroad company*."

S. F. PHILLIPS,
Solicitor-General.